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URGENT INTERIM OPINION ON THE DRAFT LAW “ON NON-PROFIT NON- GOVERNMENTAL ORGANIZATIONS” AND DRAFT AMENDMENTS ON “FOREIGN REPRESENTATIVES”

KYRGYZ REPUBLIC

This Urgent Interim Opinion has benefited from contributions made by Mr. Jeremy McBride, Human Rights Lawyer and Barrister, Monckton Chambers, United Kingdom; and by members of the ODIHR Panel of Experts on Freedom of Assembly and Association, including Ms. Katerina Hadzi-Miceva Evans, Executive Director, European Center for Not-for-Profit Law (ECNL); Mr. David Goldberger, Professor Emeritus of Law, Ohio State University College of Law; and Mr. Yevgeniy Zhovtis, Director of the Kazakhstan International Bureau for Human Rights and Rule of Law.

Based on an unofficial English translation of the Draft Law and Draft Amendments commissioned by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).



OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The introduction of the proposed amendments into the legal framework on domestic and foreign non-governmental organizations comes at the backdrop of a series of legislative changes in the Kyrgyz Republic since the adoption of the new Constitution in 2021. In particular, the changes to the existing Law on Non-Profit Organisations adopted in June 2021 appear already unduly restrictive.

The proposed amendments seek to introduce provisions similar to those reviewed in the past by ODIHR and the Venice Commission, which criticized them for their likely stifling impact on the right to freedom of association and the repercussions they may have on the enjoyment of other human rights, including freedom of expression.

While OSCE participating States may opt to regulate not-for-profit organizations, any legal framework on associations should be designed to create an enabling environment for the enjoyment of the right to freedom of association and its implementation, with the primary purpose of facilitating the establishment and existence of associations.

The Urgent Interim Opinion analyses two sets of proposed amendments: the draft Law "On Non-Profit Non-Governmental Organizations" submitted on 2 November 2022 by the Presidential Administration for public consultations (the “Draft Law”) and draft amendments to several legislative acts relating to so-called “Foreign Representatives” published on 21 November 2022 for public discussion on the official website of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic (hereinafter “Draft Amendments on Foreign Representatives”).

The majority of the provisions of the Draft Law are incompatible with international human rights standards. First, the Draft Law seeks to introduce more restrictive requirements for establishing “non-profit non-governmental organizations” (“non-profit NGOs”), prohibiting foreigners and stateless persons to establish or even to become members of such organizations, while also increasing the required minimum number of founders from three to ten, which is not in line with international standards and recommendations. In addition, the Draft Law introduces more onerous reporting requirements, to the already existing cumbersome obligations.

As to the activities of “non-profit NGOs”, the Draft Law grants overbroad monitoring and supervisory powers to state bodies, including regarding the compliance with one’s own charter/founding documents, which should remain of the competence of the association itself and not of the public authorities. Finally, the Draft Law also introduces new rather vague and broad grounds for liquidating “non-profit NGOs”. Thus, the provisions of the Draft Law are overly and unduly restrictive to the right to establish associations and to carry out their activities free from state interference and are incompatible with principles of a democratic society.

As to the Draft Amendments on Foreign Representatives, given their similarities with the Draft Law that ODIHR and the Venice Commission reviewed in 2013, ODIHR reiterates the concerns raised in the 2013 Joint Opinion without reservation, thereby concluding that they are not prescribed by law nor necessary in a democratic society, and therefore not compliant with the right to freedom of association.

In consequence, in the light of the analysis contained in more details hereinafter, the Urgent Interim Opinion concludes that the Draft Law and Draft Amendments on Foreign Representatives are incompatible with international human rights standards and OSCE human dimension commitments and their adoption should not be pursued further.

Given the inherent serious deficiencies of the two sets of amendments, they require comprehensive, substantial and fundamental changes amounting to a complete re-drafting to seek to make them human-rights compliant. ODIHR therefore calls upon the initiators of the proposed amendments to abandon them entirely and engage in further consultation with stakeholders with a view to enhance the legal framework for the enjoyment of the right to freedom of association in the Kyrgyz Republic.

While ODIHR recommends not to pursue the adoption of these Draft Law and Draft Amendments on Foreign Representatives, the analysis offered in this Urgent Interim Opinion aims to inform the discussions on this matter.

As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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ANNEX:

- Draft Law on Non-Profit Non-Governmental Organizations; and
- Draft Law "On Amendments to Certain Legislative Acts of the Kyrgyz Republic" (Law of the Kyrgyz Republic "On non-profit organizations", Law of the Kyrgyz Republic "On State Registration of Legal Entities, Branches (Representative Offices)" and the Criminal Code of the Kyrgyz Republic), hereinafter "Draft Amendments on Foreign Representatives"

I. INTRODUCTION

1. On 21 November 2022, the Akyikatchy (Ombudsperson) of the Kyrgyz Republic sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Draft Law “On Non-Profit Non-Governmental Organizations” submitted on 2 November 2022 by the Presidential Administration for public consultations (hereinafter “the Draft Law”).¹ On 28 November 2022, the Ombudsperson sent a follow-up request to review draft amendments to several legislative acts relating to so-called “Foreign Representatives” initiated by a member of the parliament (MP) and published on 21 November 2022 for public discussion on the official website of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic (hereinafter “the Draft Amendments on Foreign Representatives”).²
2. ODIHR confirmed the Office’s readiness to prepare a legal analysis on the compliance of the Draft Law and of the Draft Amendments on Foreign Representatives with international human rights standards and OSCE human dimension commitments.
3. Given the short timeline to prepare this legal review and the fact that the two sets of proposed amendments are likely to be further amended following public consultations, ODIHR decided to prepare an Urgent Interim Opinion. As such, the present legal opinion does not provide a detailed analysis of all the provisions of the proposed amendments but primarily focuses on the most concerning issues relating to their compliance with international human rights standards and OSCE human dimension commitments, especially in relation to (i) the establishment and registration of “non-profit non-governmental organizations”, (ii) reporting obligations, (iii) oversight and supervision by public authorities, (iv) access to resources, especially foreign funding and (v) liquidation. Given the urgency, ODIHR and the Venice Commission of the Council of Europe could not prepare the legal analysis jointly but reserve themselves the possibility of preparing a final Joint Opinion, possibly on the revised proposed amendments following public discussions, in the coming weeks. Thus, the content of this ODIHR Urgent Interim Opinion is without prejudice to any future written analysis and recommendations that ODIHR and the Venice Commission may jointly prepare in the future.
4. In the past years, ODIHR and the Venice Commission have prepared a number of legal reviews on different laws and draft laws of the Kyrgyz Republic, including most recently on the Draft Constitution that was then adopted in 2021,³ and in 2013, on the Draft Law Amending the Law on Non-Profit Organizations and Other Legislative Acts (hereinafter “2013 Joint Interim Opinion”).⁴
5. This Urgent Interim Opinion was prepared in response to the above request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.

¹ Available at <<https://www.gov.kg/ru/npa/s/4192>>.

² Available at <<http://www.kenesh.kg/ru/article/show/9730/na-obshtstvennoe-obsuzhdenie-s-21-novabrya-2022-goda-vinositsya-proekt-zakona-o-vnesenii-izmeneniy-v-nekotorie-zakonodatelnyie-akti-kirgizskoy-respubliki-zakon-kirgizskoy-respubliki-o-nekommercheskih-organizatsiyah-zakon-kirgizskoy-respubliki-o-gosudarstvennoy-registratsii-yuridicheskikh-lits-filialov-predstavitelystv-ugolovnyy-kodeks-kirgizskoy-respubliki>>.

³ See ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021.

⁴ ODIHR-Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic*, 16 October 2013.

II. SCOPE OF THE URGENT INTERIM OPINION

6. The scope of this Urgent Interim Opinion covers only the Draft Law and the Draft Amendments on “Foreign Representatives” submitted for review. Thus limited, the Urgent Interim Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating associations and other forms of not-for-profit organizations⁵ in the Kyrgyz Republic.
7. The Urgent Interim Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the proposed amendments. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Interim Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
8. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*⁶ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*⁷ and commitments to mainstream gender into OSCE activities, programmes and projects, the Urgent Interim Opinion integrates, as appropriate, a gender and diversity perspective.
9. This Urgent Interim Opinion is based on an unofficial English translation of the Draft Law and Draft Amendments on Foreign Representatives, which is attached to this document as an Annex. Errors from translation may result. The Urgent Interim Opinion is also available in Russian. In case of discrepancies, the English version shall prevail.
10. In view of the above, ODIHR would like to stress that this Urgent Interim Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the Kyrgyz Republic in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

11. The right to freedom of association is a cornerstone of a vibrant, pluralistic and participatory democracy and underpins the exercise of a broad range of other civil and political rights. Associations often play an important and positive role in achieving goals that are in the public interest, as recognized at the international and regional levels.⁸

5 For the purpose of this Urgent Interim Opinion, ODIHR uses the term “Non-Government Organization” to refer to the “Non-profit Non-Government Organizations”, which is a new legal concept that the Draft Law is seeking to introduce, though acknowledging the inherent difficulty of defining such a term, including at the international level as there is no universal definition of what constitutes a non-governmental organization. Therefore, ODIHR generally prefers using the term “association” as defined in the ODIHR-Venice Commission *Joint Guidelines on Freedom of Association* (2014) as: “an organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity or purpose” noting that “[a]n association does not have to have legal personality, but does need some institutional form or structure” (para. 7).

6 *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Kyrgyz Republic acceded to this Convention on 10 February 1997.

7 See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

8 See ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 9.

- Although the right to freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in international human rights instruments.
12. The right to freedom of association is enshrined in all major international human rights instruments, including Article 22 of the [International Covenant on Civil and Political Rights](#) (ICCPR), to which the Kyrgyz Republic is a State Party.⁹ This right also includes the right to seek, secure and utilize resources, as otherwise freedom of association would be deprived of all meaning.¹⁰ Furthermore, the 1998 [UN Declaration on Human Rights Defenders](#)¹¹ confirms that “*everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels*” (Article 1) and stipulates that states have to adopt measures to ensure this right. The Declaration further provides specifically that “*everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means in accordance with Article 3 of the present Declaration*” (Article 13). The right of access to funding is to be exercised within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards (Article 3).
 13. While the Kyrgyz Republic is not a Member State of the Council of Europe, as a member of the European Commission for Democracy through Law of the Council of Europe (Venice Commission), Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) as well as relevant case-law of the European Court of Human Rights (ECtHR) and other CoE instruments, are also of relevance and may serve as useful reference documents from a comparative perspective.
 14. At the OSCE level, the OSCE participating States committed “*to ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations which seek the promotion and protection of human rights and fundamental freedoms*” (1990 Copenhagen Document). In addition, in the 1990 Paris Document, they affirmed that “*...without discrimination, every individual has the right to (...) freedom of association.*” The OSCE participating States have also committed themselves to the aim of “*strengthening modalities for contact and exchanges of views between NGOs and relevant national authorities and governmental institutions*” (1991 Moscow Document) and to “*enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms*” (1999 Istanbul Document).
 15. Other relevant international documents and recommendations also include the [Recommendation of the Committee of Ministers of the Council of Europe Rec\(2007\)14 on the Legal Status of Non-Governmental Organisations in Europe](#) (hereafter

9 UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the ICCPR on 7 October 1994. Article 22(2) of the ICCPR stipulates that “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”.

10 See e.g., ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014), para. 102. See also UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2013 Report, [A/HRC/23/39](#), para. 8; and Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, para. 50.

11 [UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms \(Human Rights Defenders\)](#) of 9 December 1998, adopted unanimously by the United Nations General Assembly (A/RES/53/144).

“Recommendation Rec(2007)14”¹² and the 2014 ODIHR-Venice Commission [Joint Guidelines on Freedom of Association](#) (hereinafter “the Joint Guidelines”).¹³ The present Urgent Interim Opinion will also refer as appropriate to other opinions published by ODIHR and/or the Venice Commission in this field.

16. Relevant international standards concerning the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds without interference by public authority and regardless of frontiers,¹⁴ the prohibition of discrimination¹⁵ and the right to respect for private life¹⁶ are also referred to in the present Urgent Interim Opinion.
17. Based on the above, members of non-governmental organizations and other civil society organizations (CSOs) as well as CSOs themselves are the holders of human rights, including the rights to freedom of association, freedom of expression and to respect for private life. Moreover, the state has the obligation to respect, protect and facilitate the exercise of the right to freedom of association.¹⁷

2. BACKGROUND

18. The introduction of the proposed amendments to the legal framework on domestic and foreign non-profit organizations and introduction of a new concept, “non-profit non-governmental organization” comes at the backdrop of a series of legislative changes in the Kyrgyz Republic since the adoption of the new Constitution in 2021.
19. The Constitution of the Kyrgyz Republic as adopted in 2021 provides in its Article 36 that “*Everyone has a right to freedom of association*”. Article 8(1) further states that public associations may be created in the Kyrgyz Republic to implement and protect the rights, freedoms and interests of a person and a citizen. Pursuant to Article 23(2) of the Constitution, “*the rights and freedoms of a person and a citizen may be limited by the Constitution and laws in order to protect national security, public order, protect the health and morals of the population, protect the rights and freedoms of others. [...] The restrictions imposed must be proportionate to the stated objectives.*”
20. As a result of the adoption of the new Constitution, a series of legislative changes in the Kyrgyz Republic have been undertaken, including amendments to the existing Law on Non-Profit Organizations from 1999 (hereafter “1999 Law on NPOs”),¹⁸ and amended four times since, lastly in June 2021. These latest amendments already introduced new reporting requirements that have been considered by international human rights monitoring mechanisms as unduly restrictive upon the right to freedom of association. Indeed, in its Concluding Observations of 2 November 2022, the UN Human Rights Committee expressed “*deep concerns about the [amendments to the] Law on Non-Profit*

12 Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007.

13 ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014).

14 Cf. Article 19 of the ICCPR; Article 10 of the ECHR.

15 Article 26 of the ICCPR; Article 14 of the ECHR and Protocol no. 12 to the ECHR.

16 Article 17 of the ICCPR; Article 8 of the ECHR.

17 See Principle 2 of the Joint ODIHR-Venice Commission Guidelines on Freedom of Association. Indeed, according to the ECtHR, “*genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere*” (ECtHR, *Ouranio Toxo and Others v. Greece*, Application no. 74989/01, judgment of 20 October 2005, para. 37 and “*the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*” (see *Airey v. Ireland*, Application no. 6289/73, judgment of 9 October 1979).

18 For the purpose of this Urgent Interim Opinion, the English term “non-profit organization” is used to refer to “некоммерческая организация” (which is also at times translated as “non-commercial organization”) while “non-governmental organization” is used to refer to “неправительственная организация”.

Organizations, adopted in 2021, which imposes unreasonable and burdensome reporting requirements for NGOs by obliging them to post consolidated information on the sources of funds, directions of their expenditure, as well as information on the acquired, used and disposed of property.” The Committee noted “*with concern that the State party did not consider numerous appeals from international human rights mechanisms and civil society regarding the disproportionality of the imposed obligations.*” The Committee recommended to “*revise the provisions of the Law on Non-Profit Organizations to bring it into full compliance with the provisions of articles 19, 22 and 25 of the [ICCPR]. It should ensure that any legislation governing public associations and NGOs does not lead in practice to undue control over or interference in the activities of NGOs.*”¹⁹

21. On 2 November 2022, the Draft Law was published on the website of the Cabinet of Ministers for public consultations until 2 December 2022.²⁰ Overall, the Draft Law aims at establishing additional obligations for non-profit organizations and at creating a special legal regime for structural units of foreign non-profit organizations. According to the Explanatory Note to the Draft Law, it is developed to ensure “openness”, “publicity of activities” of non-profit organizations, including subdivisions of foreign non-profit non-governmental organizations. The Draft Law is to enter into force on 1 May 2023 and will replace the current 1999 Law on Non-Profit Organizations (Article 37 of the Draft Law).
22. In parallel, on 21 November 2022, a second set of proposed amendments to several legislative acts, including the existing (1999) Law on Non-Profit Organizations, the Law on State Registration of Legal Entities, Branches and Representations and the Criminal Code (hereinafter “Draft Amendments on Foreign Representatives”), initiated by an individual MP, were published on 21 November 2022 for public discussion on the official website of the Jogorku Kenesh.²¹ The latter partially overlaps with the Draft Law in that it aims at creating a special legal regime for structural units of foreign non-commercial organizations but also for non-profit organizations exercising the function of a “foreign representative”. It is worth noting that these proposed amendments are not different in substance from the Draft Law Amending the Law on Non-Profit Organizations and Other Legislative Acts reviewed by ODIHR and the Venice Commission in 2013²² (which was not adopted), except for the replacement of the term “foreign agent” with “foreign representative”.

3. GENERAL COMMENTS

23. Article 2 of the Draft Law provides that a “*non-profit non-governmental organisations (hereinafter referred to as a non-governmental organization) is an organization where founders (members) do not represent a government body, profit-making is not a major objective, and the obtained profit is not distributed among members.*” It further notes that “*Non-governmental organizations may be established in the form of public or religious organizations (associations), foundations, associations and unions, as well as in other forms provided by the legislation of the Kyrgyz Republic*” (Article 2(3)). No other forms of “non-profit NGOs” is contemplated under Article 2 of the Draft Law.

19 See UN Human Rights Committee, Concluding observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3, 3 November 2022, paras.49-50.

20 Available at <<https://www.gov.kg/ru/npa/s/4192>>.

21 Available at <<http://www.kenesh.kg/ru/article/show/9730/na-obshtestvennoe-obsuzhdenie-s-21-noyabrya-2022-goda-vinositsya-proekt-zakona-o-vmeseni-izmeneniy-v-nekotorie-zakonodatelynie-akti-kirgizskoy-respubliki-zakon-kirgizskoy-respubliki-okenommercheskih-organizatsiyah-zakon-kirgizskoy-respubliki-ogosudarstvennoy-registratsii-yuridicheskikh-lits-filialov-predstavitelstv-ugolovnyy-kodeks-kirgizskoy-respubliki>>.

22 See ODIHR-Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic*, 16 October 2013.

24. Article 2(2) provides that “non-profit NGOs” may be established “*to achieve social, charitable, cultural, educational, scientific and managerial goals, to protect public health, develop physical culture and sports, meet spiritual and other non-material needs of citizens, protect the rights and legitimate interests of citizens and organizations, resolve disputes and conflicts, provide legal assistance, as well as for other purposes aimed at achieving public benefits*”.
25. The stipulation in Article 2(2) of the goals for which a “non-profit NGO” can be established is not, however, consistent with international standards and commitments, as they are limited to certain specified purposes and to “*other purposes aimed at achieving public benefits*”.
26. Generally, it is a matter for the State concerned to choose to support certain forms of non-profit activities or associations serving a public benefit, provided, however, that such a decision is not based on any prohibited ground of discrimination. However, restricting the ability of natural and legal persons to form associations to only those entities that are considered to have “*public benefit purposes*” is inconsistent with the guarantee of the right to freedom of association, especially as the wording itself is vague and can be subjected to strict and arbitrary interpretation by the public authorities.
27. The most important aspect of the definition of “association” – and, indeed, of the right to freedom of association – is that persons are able to act collectively in pursuit of common interests, which may be those of the members themselves, of the public at large or of certain sectors of the public.²³ This may also include objectives that are unpopular and run counter to the opinions and beliefs of the majority of the population.²⁴ As stated in the Joint Guidelines, “*Legislation pertaining to associations should not restrict or dictate the objectives and spheres of activities that associations must or cannot undertake, beyond those that are incompatible with international human rights standards*”.²⁵ The founders and members of an association should be free to determine the scope of its goals and objectives and associations should be free to pursue these goals and objectives without undue interference of the state or third parties, even if the authorities consider the aims of the association as not benefiting the public interest. Of note, while the list of goals listed under Article 2(2) is not exclusive, it fails to refer to some critical objectives and field of activities of associations, such as in the areas of promotion and protection of human rights, women’s rights, children’s rights, rights of ethnic and national minorities.²⁶
28. The goals and objectives of an association must, however, be compatible with international human rights standards. Only in exceptional circumstances such as when organizations “*promot[e] propaganda for war or incit[e] national, racial or religious hatred [that] constitutes incitement to discrimination, hostility or violence*” – defined in accordance with international human rights standards – can they be prohibited.²⁷ Thus, it

23 Joint Guidelines on Freedom of Association (2014), paras. 47 and 76.

24 Joint Guidelines on Freedom of Association (2014), para. 82.

25 Joint Guidelines on Freedom of Association (2014), para. 179.

26 Joint Guidelines on Freedom of Association (2014), paras. 9 and 13.

27 Joint Guidelines on Freedom of Association (2014), para. 88. See also the following, providing that they are defined in accordance with international human rights standards: the “*direct and public incitement to commit genocide*” (as per Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, to which the Kyrgyz Republic acceded on 5 September 1997), the “*propaganda of war*” and the “*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*” (Article 20 (1) and (2) of the ICCPR, as interpreted under international law), and “*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as [...] incitement to [acts of violence] against any race or group of persons of another colour or ethnic origin*” (Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to which the Kyrgyz Republic acceded on 5 September 1997), providing that this (1) is intended to incite imminent violence; and (2) is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

- is for the founders and members of an NGO to determine its goals, while respecting such standards.
29. In light of the foregoing, as the objective of Article 2(2) of the Draft Law is not to confer some form of public benefit status on certain categories of “non-profit NGOs” but to regulate the possibility of establishing these organizations as such, the definition in Article 2(2) is incompatible with international and regional human rights standards and commitments and should be reconsidered. **It is recommended instead that the definition provides that “non-profit NGOs” may be established to pursue the common interests of their founders and members.**
 30. Article 2(3) of the Draft Law deals with the forms that “non-profit NGOs” may take, referring to “*public or religious organizations (associations), foundations, associations and unions, as well as [...] other forms provided by the legislation of the Kyrgyz Republic*”. This open-ended formulation creates legal uncertainty as to the actual scope of the Draft Law, all the more since other provisions refer in addition to political parties (e.g., Article 8(1) and (4)). **It is therefore recommended that the legal drafters define more clearly the scope of the Draft Law.** More generally, several provisions of the Draft Law make a broad reference to some form of regulation “*by the legislation of the Kyrgyz Republic*”. Insofar as this is intended to refer to any existing legislation, the requirement of legal certainty – which is fundamental to the rule of law – would require that there be a specific reference to the laws concerned.
 31. The Draft Law introduces a separate legal regime for the branches and subdivisions of the so-called foreign non-profit non-governmental organizations (hereafter “FNGOs”). In addition, on 21 November 2022, the Draft Amendments on Foreign Representatives were published. Some of the provisions of these two sets of amendments overlap to a certain extent.
 32. The Draft Law defines a FNGO as an organization established outside the territory of the Kyrgyz Republic in accordance with the legislation of a foreign state, where founders (members) do not represent a government body, profit-making is not a major objective, and the obtained profit is not distributed among members (Article 3(1) of the Draft Law). FNGOs shall carry out their activities through their subdivisions (branches and representative offices), which are recognized as a form of a non-profit non-governmental organization and are subject to state registration (Article 3 of the Draft Law). The Draft Amendments propose a similar definition of a “foreign non-profit organization” in draft amendment to Article 2 of the existing Law on Non-Profit Organizations.
 33. Article 5(2)(10) of the Draft Law provides that “non-profit NGOs”, once registered, can “exercise other rights not contrary to the laws of the Kyrgyz Republic”. This provision has the potential to create uncertainty as to what they are actually entitled to do. The Draft Law could specify instead that they would have the same capacities as are generally enjoyed by other legal persons. Moreover, the acceptability of the requirement in Article 5(3) that “non-profit NGOs” must pay taxes and other mandatory payments to the budget depends very much on what such taxes and payments actually entail. These are not matters dealt with in the Draft Law and should be clarified.
 34. Overall, the Draft Law (especially Articles 6, 14, 29-30) appears overly detailed and prescriptive with regard to the structure and functioning of “non-profit NGOs”, including their names, internal organization and structure, content of the constitutive documents,

and decision-making process.²⁸ According to international good practice, in light of the fundamental principle of the independence of associations, they should be granted a certain level of autonomy in their internal structure, organization and decision-making, as well as functioning.²⁹ As it stands, the Draft Law is overregulating matters that usually lie within the discretion of associations. As such, the provisions appear too detailed and unnecessary, as they limit associations’ right to self-regulate these matters, and thereby constitute an excessive encroachment on the independence and autonomy of associations. **It is recommended to review the Draft Law, especially Articles 6, 14, 29-30 to ensure the associations’ autonomy to decide on their structure, organization, internal governance and decision-making processes.**

4. ESTABLISHMENT OF NON-PROFIT NON-GOVERNMENTAL ORGANIZATIONS

35. Article 13 of the Draft Law provides that “legally capable citizens” and (or) legal entities may be the founders of a “non-profit NGO”. Foreign citizens or stateless persons, persons listed in accordance with the Law of the Kyrgyz Republic on Combating Terrorism Financing and Legalization of Proceeds from Crime as well as citizens, public associations or religious organizations prosecuted under the Laws of the Kyrgyz Republic on Countering Extremist Activity and on Countering Terrorism may not be founders of “non-profit NGOs”. It further provides that at least 10 citizens or one legal entity may found a “non-profit NGO”. The restrictions on the ability to be a founder of a “non-profit NGO” are at odds with international standards and recommendations.
36. First, according to the Joint Guidelines, an agreement between at least two persons should ordinarily be a sufficient basis for the establishment of an association.³⁰ Where a greater number of persons is required in order to establish an association, the number concerned should be neither excessive nor incompatible with the nature of the association.³¹ The UN Special Rapporteur noted that the right to form and join an association is an inherent part of the right to freedom of association and considers it best practice that legislation require no more than two persons to establish an association.³² In addition, there is no clear *rationale* for requiring at least ten founders for a “non-profit NGO”, whereas Article 19 of the existing Law on Non-profit Organizations requires three individuals for founding a “public association”. **In this light and in the absence of a justification thereto, it is recommended to reconsider the minimum number of persons required to form an association.**
37. Second, the requirement that only “citizens” may found an association, with the explicit exclusion of foreigners and stateless persons (Article 13(2)(1) of the Draft Law) contradicts the right of *everyone* to freedom of association as guaranteed by Article 36 of the Constitution and international human rights standards, including as explicitly

28 See e.g., Art. 6.1, which indicates what the name of the association should include, such as the nature of its activities, Article 14 (on the content of constitutive documents), Article 29 (on the procedure for speaking on behalf of an NGO), Article 30 (on the governing bodies and organizational structure of the NGO).

29 See ODIHR-Venice Commission, Joint Guidelines on Freedom of Association (2014), which state that “[i]n pursuing their objectives and in conducting their activities, associations shall be free from interference with their internal management, organization and affairs” (para. 29); “[f]ounders and members shall be free in [...] adopting their own constitutions and rules, determining their internal management structure and electing their boards and representatives” (para. 86); “[a]ssociations should be free to determine their internal management structure, and their highest governing bodies [...] [and] should not be required to obtain any authorization from a public authority in order to change their internal management structure, the frequency of meetings, their daily operations or rules, or to establish branches that do not have distinct legal personality” (para. 175).

30 *Ibid.* ODIHR-Venice Commission, Joint Guidelines on Freedom of Association (2014), paras. 78 and 148.

31 *Ibid.* ODIHR-Venice Commission, Joint Guidelines on Freedom of Association (2014), para. 148.

32 UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2023 Report to the UN Human Rights Council, [A/HRC/20/27](#), 21 May 2012, paras. 53-54.

provided in Article 22 ICCPR, as well as the principle of non-discrimination.³³ While certain restrictions may be introduced with respect to the establishment by non-nationals of certain types of associations (such as political parties),³⁴ in so far as they are proportionate and do not unduly limit the exercise of the right to freedom of association, the blanket prohibition for non-nationals or stateless persons to establish, participate in and be a member of any type of “non-profit NGOs” is clearly disproportionate and should be reconsidered entirely.³⁵ **It is recommended to remove this requirement from the Draft Law.**

38. Third, the reference to “legally capable citizens” is problematic as it potentially excludes children as well as other individuals on the basis of intellectual or psychological or other disability, from enjoying their right to freedom of association. Children’s right to freedom of association is guaranteed by Article 15 of the UN Convention on the Rights of the Child (CRC)³⁶ and any restriction to this right must be based in law, serve a legitimate aim recognized by international standards and be proportionate to that aim (Article 15(2) CRC), as required for other restrictions on the right to freedom of association. While certain restrictions in terms of the legal capacity of children to form and join associations may be justified, full account needs to be taken of the principle of the evolving capacity of the child when adopting such limitations.³⁷ The Draft Law should be adapted accordingly to respect and facilitate the right of children to freedom of association. Moreover, freedom of association must be respected without discrimination, including on the ground of mental disability.³⁸ Article 12.2 of the Convention on the Rights of Persons with Disabilities (CRPD)³⁹ states that “*States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*”. As emphasized in General Comment No. 1 to Article 12 of the CRPD on equal recognition before the law, legal capacity is recognized as “*an inherent right accorded to all people, including persons with disabilities.*” In addition, pursuant to Article 29(b)(i) of the CRPD, States Parties shall undertake to promote actively an environment in which persons with disabilities can participate in “*non-governmental organizations and associations concerned with the public and political life of the country.*” More generally, it is recommended to reconsider entirely **the concept of depriving anyone of legal capacity in the Kyrgyz Republic.**⁴⁰
39. Further, the exclusion of persons listed in accordance with the Law of the Kyrgyz Republic on Combating Terrorism Financing and Legalization (Laundering) of Proceeds from Crime and citizens, public associations or religious organizations prosecuted under the Laws of the Kyrgyz Republic on Countering Extremist Activity and on Countering Terrorism is also problematic. In practice, the lack of legal certainty as to the definition of “terrorism” and the listing process (such as lack of clear and precise criteria for being

33 Article 22(1) of the ICCPR states “*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*” See also ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paras. 28 and 139.

34 See e.g., *ibid.* *Joint Guidelines on Freedom of Association* (2014), para. 140. See also ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd edition, 2020), para. 149.

35 See for example Conference of INGOs of the Council of Europe, Expert Council on NGO Law, Conditions of Establishment of Non-Governmental Organisations, January 2009 at: <<http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680306eb1>>.

36 UN Convention on the Rights of the Child (CRC), adopted by General Assembly resolution 44/252 of 20 November 1989. The Kyrgyz Republic acceded to the CRC on 7 October 1994.

37 ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 143.

38 *Ibid.*, *Joint Guidelines on Freedom of Association* (2014), para. 93.

39 UN Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006 by General Assembly resolution A/RES/61/106. The Kyrgyz Republic ratified the CRPD on 16 May 2019.

40 See for similar recommendation, though in the context of political party regulation, ODIHR-Venice Commission, *Joint Opinion on the Draft Law on Political Parties of Mongolia*, 20 June 2022, paras. 36-38.

listed as a terrorist organization), which may not offer access to an effective remedy and due process guarantees when seeking removal from the list,⁴¹ creates a potential risk that ordinary criminal offenders, political dissidents, human rights defenders or other individuals could be unduly listed as “terrorists” and thereby unduly deprived of their right to establish an association.⁴² Moreover, ODIHR and other international bodies have raised concerns pertaining to “extremism”/“extremist” as a legal concept and the vagueness of such a term, particularly in the context of criminal legislation.⁴³ Indeed, the UN Human Rights Committee noted with concerns “*the overly broad and vague definitions contained in the national counter-terrorism legislation, in particular those of ‘extremism’ and the lack of sufficient safeguards to prevent the arbitrary use of counter-terrorism measures to restrict legitimate exercises of rights and freedoms guaranteed under the ICCPR*”.⁴⁴ On several occasions, ODIHR also questioned the practice of having specific legislation on countering so-called “extremism” at all, given the inherent difficulty of providing a legal definition of the term “extremism” and the serious human rights concerns arising from vague and overbroad definitions and provisions.⁴⁵ It is also important to emphasize that in its latest 2020 Report, the UN Special Rapporteur on Counter-Terrorism and Human Rights specifically called upon States to repeal provisions regulating so-called “extremism” in their laws.⁴⁶ While recognizing that OSCE participating States may have a legitimate aim to protect national security or fight crime effectively, the inherently vague and broad nature of the term “extremism” and “terrorism” may cover a wide-range of acts. By extension, this may lead to the abuse of measures to counter terrorism and so-called “extremism” to restrict the legitimate exercise of the right to freedom of association. **It is recommended to reconsider such restrictions to the right to establish “non-profit NGOs”.**

41 See UN Special Rapporteur on counter-terrorism, *2005 Report*, UN Doc. E/CN.4/2006/98, paras 26-28; *2010 Report on Ten areas of best practices in countering terrorism*, UN Doc. A/HRC/16/51 (2010), Practice 9. In addition to judicial review, the UN Special Rapporteur has identified six minimum safeguards with regard to the implementation of any sanctions against individuals or entities on any terrorist list: (1) sanctions against an individual or entity, including the terrorist listing, shall be based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act, as properly defined; (2) the listed individual or entity shall be promptly informed of the listing and its factual grounds, the consequences of such listing, and the rights pertaining to the listing (i.e. the guarantees identified in subparagraphs (3) to (6) of this paragraph); (3) the listed individual or entity shall have the right to apply for delisting or non-implementation of the sanctions, and shall have a right to a judicial review of the decision resulting from the application for delisting or non-implementation, with due process applying to such review, including disclosure of the case against the person and such rules concerning the burden of proof that are commensurate with the severity of the sanctions; (4) the listed individual or entity shall have the right to make a fresh application for delisting or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing; (5) the listing of an individual or entity, and the sanctions resulting from it, shall lapse automatically after 12 months, unless renewed through a determination that meets the guarantees in subparagraphs (1) to (3) of this paragraph; and (6) compensation shall be available for persons and entities wrongly affected, including third parties.

42 See e.g., OSCE, OSCE Media Freedom Representative concerned by new amendments to Anti-Terrorism Law in Kyrgyzstan, 6 May 2020, <<https://www.osce.org/representative-on-freedom-of-media/451582>>.

43 See e.g., UN Special Rapporteur on Counter-Terrorism and Human Rights, *2020 Report on the human rights impact of policies and practices aimed at preventing and countering violent extremism*, 21 February 2020, A/HRC/43/46, paras. 12-14. See also ODIHR, *Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (2020), Sub-Section 3.2; OSCE, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014), Sub-Section 2.3.1. See also ODIHR, *Opinion on the Law on Countering Extremist Activity of the Republic of Moldova* (30 December 2019), paras. 13-16; *Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan* (22 November 2019), paras. 12-16. See also ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), paras. 100, 205 and 213; Venice Commission, *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, CDL-AD(2012)016-e, 15-16 June 2012, para. 30.

44 See UN Human Rights Committee, *Concluding observations on the third periodic report of Kyrgyzstan*, CCPR/C/KGZ/CO/3, 3 November 2022, paras.19-20.

45 See e.g., ODIHR, *Opinion on the Law on Countering Extremist Activity of the Republic of Moldova* (30 December 2019), paras 10 and 22; and *Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan* (22 November 2019), paras 9 and 21.

46 UN Special Rapporteur on Counter-Terrorism and Human Rights, *2020 Report on the human rights impact of policies and practices aimed at preventing and countering violent extremism*, 21 February 2020, A/HRC/43/46, para. 52(b).

5. REGISTRATION

40. Article 16(1) of the Draft Law provides that a “...*non-governmental organization is subject to state registration in accordance with the Law of the Kyrgyz Republic on State Registration of Legal Entities and the procedure for state registration of non-governmental organizations stipulated by this Law.*” The decision on registration or refusal thereof is taken by the Ministry of Justice (para. 2).
41. Whilst Article 6(2) of the current Law on Non-Profit Organizations explicitly provides that such organizations may be created with or without the formation of a legal entity, the Draft Law does not include a reference to the possibility to create an unregistered “non-profit NGO”. Although not explicitly forbidding such organizations, based on the wording of Article 16 and Article 5 (1) of the Draft Law, registration of “non-profit NGOs” would be mandatory without exceptions.⁴⁷ This interpretation seems to be confirmed when Article 16 is read together with Article 37(4), which provides that those “non-profit NGOs” that fail to undergo state registration or re-registration in accordance with the requirements of the Draft Law shall be considered liquidated from 1 January 2024. In this regard, the Joint Guidelines note that “*legislation must recognize both informal and formal associations or, at a minimum, permit the former to operate without this being considered unlawful*” and that states should create “*an enabling environment in which formal and informal associations can be established and operate*”.⁴⁸ Moreover, associations should not be banned merely because they do not have legal personality. This principle is particularly important, since those persons or groups who may face legal, practical, social, religious or cultural barriers to formally establishing an association should still be free to form or join informal associations and to carry out activities.⁴⁹ **It is therefore recommended to specify, as done in the existing Law, that “non-profit NGOs” may be created with or without the formation of a legal entity.**
42. The registration requirements for “non-profit NGOs” are laid out in Article 16(5) of the Draft Law. It provides that the following documents be submitted to the Ministry of Justice:
- “...1) *application, signed by an authorized person (hereinafter - the applicant), indicating his/her surname, name, patronymic, place of residence and contact phone numbers;*
 - 2) *founding documents of the non-commercial organization in three copies;*
 - 3) *decisions on the establishment of the non-governmental organization and on approval of its founding documents, indicating the composition of elected (appointed) bodies in three copies;*
 - 4) *information about the founders, indicating surnames, names, patronymic, place of residence, place of work or study (in three copies);*
 - 5) *document confirming payment of the state fee;*

47 The Explanatory Note to the Draft Law provides that “...*non-governmental organizations, including branches and representative offices of foreign non-commercial non-governmental organizations are subject to mandatory state registration with the Ministry of Justice of the Kyrgyz Republic...*”

48 See ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paras. 48 and 74; see also para. 69, stating that “*an unregistered association can also benefit from the protection conferred by Article 22 of the ICCPR and Article 11 of the ECHR*”. See also Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, para. 3, which states that “*NGOs can be either informal bodies or organizations or ones which have legal personality*”

49 See ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paras. 48-49.

6) *information on address (location) of the permanent body of the non-governmental organization;*

7) *in case a name of a non-governmental organization uses a name of a citizen, symbols protected by the legislation of the Kyrgyz Republic on the protection of intellectual property or copyrights, as well as full name of another legal entity as part of its own name - documents confirming the authority to use them.”*

43. In the OSCE region, many states require associations to undergo formal notification, registration or other similar procedures in order to acquire legal personality. If such procedures are contemplated, the Joint Guidelines recommend as a good practice to provide for a notification procedure rather than a registration procedure. Should the latter be chosen, it should provide at least for an implicit approval mechanism, so that approval is considered to be granted within a certain and adequate number of days following the application to the authorities.⁵⁰ Where an association wishes to register to acquire legal personality, procedures for doing so should not be cumbersome, but should be simple and swift to facilitate the process and the registration/notification requirements should be sufficiently relevant and not unnecessarily burdensome.⁵¹ Legislation should make the process of notification or registration as simple as possible and, in any case, not more cumbersome than the process created for other entities, such as businesses.⁵²
44. From the Draft Law it is not clear what the state fee (Article 16(5)(5)) is for the registration of an NGO. Any fees charged in the process should take into account the desirability of encouraging the formation of associations and their not-for-profit character; they should not be set at a level that discourages or makes applications for registration impractical.⁵³
45. It is observed that the timeframe for registration of an NGO is 30 days (para. 8) whereas the registration of private companies may be done much more rapidly. As underlined in the Joint Guidelines, “[a]pplications for registration should be determined without undue delay and should be dealt with within a matter of weeks”.⁵⁴ **It is recommended to reconsider the timeline for registration of “non-profit NGOs”, with a view to shorten it and align it with the timeline required for registering a private business entity.**
46. To establish a branch or subdivision of a FNGO it is required to notify the Ministry of Justice within two months of the decision to establish a branch or representative office (Article 15(1) of the Draft Law). This notification should include information on the founders and address (location) of its management body and be submitted with its founding documents, decision of its management body to establish a branch or representative office of this organization, regulation of the branch or representative office, decision on the appointment of the manager of a branch or representative office and a document specifying the goals and objectives of establishing a branch or representative office. In addition to that, the branch or subdivision of a FNGO is required to submit an extract from the register of foreign legal entities of the corresponding country of origin or other document of equal legal force, confirming the legal status of the founder (Article 16(5)(8) of the Draft Law).
47. As stressed in the 2013 Joint Interim Opinion, while FNGOs may be required to obtain some forms of authorization to operate in a country other than the one in which they have

50 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 154.

51 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paras. 48-49 and 151.

52 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 156.

53 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 156.

54 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 161.

been established, they should not be required to establish a new and separate entity for this purpose and the procedure should not be overly cumbersome or be subject to arbitrary application by the public authorities;⁵⁵ the said authorization should only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct.⁵⁶ FNGOs may be subjected to the same accountability requirements as other non-governmental organizations with legal personality in their host country, but these requirements should only be applicable to their activities in that country.⁵⁷ The Draft Law also does not provide clarity in terms of the required documents for establishment of a branch or subdivision of FNGOs *that are not registered in their respective home countries*. Also, the status of those FNGOs that seek to carry out monitoring or other activities in the country but without establishing any presence in the country is unclear.

48. **The procedure for establishing a branch or subdivision of FNGOs and operating in the Kyrgyz Republic should be reviewed with a view to ensure it is not burdensome and not subject to arbitrary interpretation.**
49. Article 17(1) of the Draft Law provides five grounds for refusing the registration of an NGO, including:
 - “...1) *if the founding documents of the non-governmental organization contradict the Constitution of the Kyrgyz Republic, this Law and the legislation of the Kyrgyz Republic;*
 - 2) *if a non-governmental organization under the same name has already been registered;*
 - 3) *if the name of the non-governmental organization offends the morals, ethnic and religious feelings of citizens;*
 - 4) *if paperwork required for state registration under this Law are incomplete or improperly produced, or submitted to an inappropriate body;*
 - 5) *if a person who acted as a founder cannot be a founder of a non-governmental organization as stipulated in Article 15 (3) of this Law...*”
50. Only the association’s ability to meet formal requirements should be relevant for the purpose of registration.⁵⁸ Overall, the above-mentioned grounds for refusal are problematic. First, the reference to the founding documents contradicting the Constitution or legislation of the Kyrgyz Republic appears overly broad and vague, and subject to potentially arbitrary interpretation by registration authorities. As mentioned above, pursuant to international human rights standards, goals and objectives of an association can only be restricted in exceptional cases provided in international human rights standards (see para. 28). Also, if the non-compliance to applicable legislation may be rectified, the founders should be offered such a possibility (see para. 53 below). **It is recommended to clarify the relevant mandatory norms in the Constitution and other laws that the founding documents should not contradict, providing that such norms are themselves compliant with international human rights standards, to avoid arbitrary interpretation.**
51. Moreover, the refusal to register an NGO for having a name that “*offends the morals, ethnic and religious feelings of citizens*” is similarly overbroad and vague. In general,

55 ODIHR and the Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013, paras. 40-43. The registration requirement runs contrary to Principle 40 of the Fundamental Principles and paragraphs 42 and 45 of Recommendation CM/Rec (2007)014. In its 2009 [ODIHR Opinion on the draft Law of the Kyrgyz Republic on Amendments and Addenda to Some Legal Acts](#), ODIHR recommended to reconsider the requirement to register branches and representative offices.

56 *Ibid.* Council of Europe Recommendation CM/Rec (2007)014, para. 45.

57 Paragraph 66 of Recommendation CM/Rec (2007)014.

58 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 158.

legislation should refrain from restricting the use of names of associations, unless they impinge on the rights of others or are clearly misleading, such as when the name gives the impression of being an official body or of enjoying a special status under the law, or leads to the association being confused with another association.⁵⁹ While Article 22(2) of the ICCPR refers to the protection of morals as a potential ground for restricting the right to freedom of association, the Human Rights Committee noted that “*the concept of morals derives from many social, philosophical and religious traditions*” and that any limitation imposed for the “*purpose of protecting morals must be based on principles not deriving from a single tradition*”. The name of an association is also protected by the right to freedom of expression, and as such, it is worth reiterating that freedom of expression is also applicable to information and ideas that offend, shock or disturb the State or any sector of the population.⁶⁰ Hence, **given the potential for arbitrary interpretation, the protection of morals as a ground for restricting the freedom to choose one association’s name should be reconsidered entirely or restrictively defined.**

52. Similarly, the reference to “*ethnic and religious feelings*” should not be used to unduly prevent criticism directed at ideas, beliefs or ideologies, religions or religious institutions, or religious leaders, or critical comments on religious doctrine and tenets of faith.⁶¹ The UN Human Rights Committee has expressly recognized that “[*p*]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20 para. 2 of the Covenant” i.e., when constituting incitement to discrimination, hostility or violence, defined in accordance with international human rights standards.⁶² Moreover, Article 22 of the ICCPR does not provide such a ground. As emphasized in the Joint Guidelines, the list of restrictive grounds in the ICCPR is exhaustive and shall be narrowly interpreted.⁶³ **In light of the foregoing, it is recommended to delete the reference to names that “offend the ethnic or religious feelings of citizens” from the Draft Law in order to avoid an overbroad and discretionary interpretation by the registration authorities.**
53. The Draft Law also allows registration to be refused on the basis that the documents required for registration are “*incomplete or improperly produced, or submitted to an inappropriate body*” (Article 17(1)(4)). The Joint Guidelines provide that legislation should not deny registration based solely on technical omissions, such as a missing document or signature, but should give applicants a specified and reasonable time in which to rectify any omissions, while at the same time notifying the association of all requested changes and the rectification required.⁶⁴ The time provided for rectification should be reasonable, and the association should be able to continue to function as an informal, unregistered body.⁶⁵ Whereas Article 16(6) of the Draft Law provides that

59 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 158.

60 *Ibid.* ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 182.

61 See e.g., UN Human Rights Committee, *General Comment no. 34 on Article 19 of the ICCPR (2011)*, para. 48; and Venice Commission, *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, CDL-AD(2008)026-e, para. 76.

62 See *ibid.* para. 48 (UN Human Rights Committee General Comment no. 34). See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *2010 Joint Declaration on Ten Key Threats to Freedom of Expression*, 3 February 2010, Section 2 on Criminal Defamation.

63 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 34. See also e.g., ODIHR-Venice Commission, *Joint Opinion on Draft Law No. 140/2017 of Romania on Amending Governmental Ordinance No. 26/2000 on Associations and Foundations*, CDL-AD(2018)004, para. 34. For reference, see also ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Application nos. 41340/98 and 3 others, 13 February 2003, para. 100.

64 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 160.

65 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 160.

refusal of registration does not constitute an obstacle to resubmission for registration if errors previously identified have been mended, **it is recommended that the Draft Law provides for a reasonable rectification period instead as this would be less cumbersome than complete resubmission.**

54. In addition, Article 17(2) of the Draft Law lists the grounds for refusing the registration of subdivisions of FNGOs, including when (1) the submitted founding documents of the FNGO contain inaccurate information, (2) goals and objectives of establishing a branch or representative office of a FNGO contradict the Constitution of the Kyrgyz Republic, this Law and the legislation of the Kyrgyz Republic, (3) goals and objectives of establishing a branch or representative office of a FNGO pose a threat to the sovereignty, constitutional order, territorial integrity, national unity and identity of the people of Kyrgyzstan, cultural heritage and national interests of the Kyrgyz Republic, and (4) when a registered branch or representative office of a FNGO has been removed from the register due to gross violations of the Constitution of the Kyrgyz Republic, this Law and the legislation of the Kyrgyz Republic.
55. As noted above, the broad reference to contradiction with the Constitution or legislation of the Kyrgyz Republic is subject to potentially arbitrary interpretation by registration authorities and should be reconsidered. Moreover, the aforementioned comment regarding denial of registration solely on technical omissions is also applicable. **It is recommended to remove the refusal ground based on a finding that inaccurate information was provided.** Similarly the grounds for refusing registration due to the fact that the goals and objectives are considered to pose a “*threat to national unity and identity of the people of Kyrgyzstan, cultural heritage and national interests of the Kyrgyz Republic*”, appear overbroad and vague and again potentially subject to arbitrary interpretation. Especially, such a wording could potentially serve as a ground for refusing registration of associations that defend the rights of minorities, peacefully call for regional autonomy, defend ideas that are not necessarily in accordance with public policies, or even ideas contesting the established order or advocating for a peaceful change of the Constitution, all of which should be protected by the rights to freedom of association and to freedom of expression⁶⁶ (see also para. 28 on goals and objectives of associations). **It is therefore recommended to remove such refusal grounds.**
56. Finally, pursuant to Articles 15(6) and 16(8) of the Draft Law, in the absence of a ground for refusal of registration, the Ministry of Justice shall take a decision on registration of the FNGO and of the non-profit NGO respectively no later than 30 days from the date of receipt of the documents. It is not clear what will be the format of a refusal to register a non-profit NGO. In principle, the responsible state body should be required to provide a detailed written statement of reasons for a decision to refuse the registration of an association; such reasons should not go beyond what is specified in the applicable law.⁶⁷ The reasons set out in law should be compatible with international human rights standards, the rejection of a registration should be exclusively based on non-compliance with the prescribed formalities, or the existence of inadmissible names or objectives, in cases where these do not comply with international standards or with legislation that is consistent with such standards.⁶⁸ Unsuccessful applicants should be able to appeal decisions denying their application before an independent and impartial tribunal.⁶⁹ Article 17(5) of the Draft Law refers to appeal to a higher authority or to a court, but does not necessarily guarantee access to an independent and impartial tribunal. **The provisions**

66 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 182

67 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 162.

68 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 161.

69 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 163.

pertaining to refusal of registration should be substantially revised to comply with the above recommendations.

6. REPORTING OBLIGATIONS

57. Article 34 of the Draft Law provides reporting requirements for “non-profit NGOs”, in particular:

“...2. A non-governmental organization shall provide information about its activities to state statistical and tax authorities, the Ministry of Justice of the Kyrgyz Republic and its territorial bodies, prosecution authorities of the Kyrgyz Republic, founders and other persons in accordance with the legislation of the Kyrgyz Republic and the founding documents of the non-commercial organization. [...]

4. Non-governmental organizations shall submit reports on their activities, composition of their management bodies, as well as documents on expenditure of funds and use of other property, including those received from international and foreign organizations, foreign citizens and stateless persons to the state statistics and tax authorities, the Ministry of Justice of the Kyrgyz Republic and its territorial bodies, and prosecution authorities of the Kyrgyz Republic. Forms and timeframes for the submission of these documents shall be determined by the Cabinet of Ministers of the Kyrgyz Republic...”

58. In accordance with Article 17 of the current Law on NPOs, as amended in June 2021, NPOs are already required to publish information about the sources of their income and expenditure, as well as property acquired, used, and disposed of, on the website of the State Tax Service annually. The Draft Law expands the bodies to which these reports need to be submitted, namely the statistical and tax offices, the Ministry of Justice as well as the Prosecutor’s Office. The Draft Law additionally requires “non-profit NGOs” to submit documents containing a report on their activities and documents on expenditure of funds and use of other property. The proposed Draft Amendments to Article 17 of the current Law on NPOs on so-called “Openness of NPOs” would add similar reporting obligations for all NPOs while specifying that the “amount and structure of income”, the “number and composition of staff” and their remuneration and pro bono work provided to an NPO is not protected by “commercial secret” (for other reporting requirements imposed on so-called “foreign representatives”, see Sub-Section IV).
59. These new reporting requirements undoubtedly impose additional burdens on the “non-profit NGOs”/NPOs, and thus affect their right to freedom of association, which also includes the right to access to resources. In order to be compatible with international human rights standards, and the conditions regulating whether restrictions of this right are permissible or not, these obligations would need to be prescribed by a precise, certain and foreseeable law; must pursue one or more legitimate aims as set out in Article 22(2) of the ICCPR, must be necessary in a democratic society, which presupposes the existence of a “pressing social need”, and respect the principles of proportionality and non-discrimination.⁷⁰
60. The legitimate aims listed in Article 22(2) of the ICCPR include national security or public safety interests, the prevention of disorder or crime/public order, the protection of health or morals and the protection of the rights and freedoms of others. Conceivably, reporting obligations could be introduced to prevent disorder or crime (including money laundering or acts of terrorism), or to ensure the protection of the rights and freedoms of others. As noted in the Joint Guidelines on Freedom of Association, “[t]he scope of these

70 See ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), Principles 9 and 10.

legitimate aims shall be narrowly interpreted” (para. 34). Bearing this in mind, the aim of ‘enhancing transparency’ or ‘openness’ of associations does not by itself constitute a legitimate aim as described in the above international instruments;⁷¹ rather, transparency may be a means to achieve one of the above-mentioned aims set out in Article 22(2) of the ICCPR. Thus, publicity or transparency in matters pertaining to funding may be required as a means to combat fraud, embezzlement, corruption, money laundering or terrorism financing. Such measures may potentially qualify as being in the interests of national security, public safety or public order.⁷²

61. Regarding the necessity and proportionality of reporting obligations, the Joint Guidelines on Freedom of Association provide that reporting requirements, where these exist, should be appropriate to the size of the association and the scope of its operations and should be facilitated to the extent possible through information technology tools.⁷³ Associations should not be required to submit more reports and information than other legal entities, such as businesses, and equality between different sectors should be exercised. Associations should not, to the extent possible, be required to submit the same information to multiple state authorities; to facilitate reporting, the state authorities should seek to share reports with other departments of the state if necessary.⁷⁴
62. First, even matters such as a country’s national interest and the fight against corruption do not justify imposing new reporting requirements for all associations without a concrete threat for the public and/or the constitutional order or any concrete indication of individual illegal activity.⁷⁵ Restrictions to the freedom of association can only be justified if they are necessary to avert a *real*, and not only hypothetical danger.⁷⁶ “Pressing social need” for such restrictions therefore presupposes “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society.⁷⁷ The Explanatory Statement to the Draft Law fails to point to a substantiated concrete risk analysis concerning any specific involvement of NPOs in the commission of crimes such as corruption, terrorism financing, money-laundering and connected crimes. Even if there were indications of terrorism financing, money laundering activities or other criminal activities on the side of individual NPOs, the correct response to this would be targeted risk-based approaches⁷⁸ and criminal investigations against these particular associations, and not blanket reporting requirements that affect numerous other organizations engaging

71 See ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 224, which states that “[t]he need for transparency in the internal functioning of associations is not specifically established in international and regional treaties owing to the right of associations to be free from interference of the state in their internal affairs. However, openness and transparency are fundamental for establishing accountability and public trust. The state shall not require but shall encourage and facilitate associations to be accountable and transparent.” See also the Preamble of the CoE Recommendation CM/Rec(2007)14, which states that “the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation”.

72 ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paragraph 220.

73 ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), paragraph 225.

74 See ODIHR and Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 227.

75 See *Financial Action Task Force (FATF)’s Recommendations*, Recommendation 8 – as amended, which states “Countries should apply focused and proportionate measures, in line with the risk-based approach”. See also e.g., ECtHR, *Sindicatul “Păstorul cel Bun” v. Romania*, no. 2330/09, 31 January 2012, para. 69.

76 See e.g., UN Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002(2005), para. 7.2.

77 See e.g. ECtHR, *Sindicatul “Păstorul cel Bun” v. Romania*, Application no. 2330/09, 31 January 2012, para. 69. In addition, in the case of *Animal Defenders International v. United Kingdom*, (Application no. 48876/08, para. 108), the Court considered that “in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation.” Moreover, a well-reasoned balancing of interests in the legislative process may lead to a greater margin of appreciation awarded by the European Court. The domestic authorities demonstrate in a transparent manner that they have carefully considered the manner of implementation of Convention rights and the choices that they made in that process. Given the subsidiary character of the Convention mechanism the European Court is then more likely to accept the choices made on the domestic level (see, M. Kuijer, “Margin of Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations”, in: 36 *HRLJ* 7-12, pp. 339-347).

78 As required by FATF.

- in entirely legitimate activities. While it is understandable that the public has an interest in knowing how public funds are spent, there is no apparent 'pressing need' for the public to obtain detailed information with respect to private funding sources of all associations' or foundations' activities. As underlined in the Joint Guidelines, "*state shall not require but shall encourage and facilitate associations to be accountable and transparent*".⁷⁹
63. Second, it is questionable whether requiring all "non-profit NGOs" to publish detailed financial reports of all their income, regardless of the amount, is indeed necessary and proportionate to achieve one of the above legitimate aims.
64. Thirdly, while it cannot be discerned from the Draft Law what the frequency of the reporting is and what formal requirements these reports should meet as this is yet to be determined by a legal act of the Cabinet of Ministers, the content as well as the frequency of the reporting provided in the Draft Amendments could appear unduly onerous and costly, all the more so as this reporting obligation will in the practice overlap with other existing reporting obligations, especially those already introduced in June 2021. This could create an environment of excessive State monitoring over the activities of associations, which could hardly be conducive to the effective enjoyment of freedom of association.⁸⁰
65. In light of the aforementioned, it can be questioned whether the additional reporting requirements together with the expansion of the bodies to whom to submit the reports to are necessary and proportionate. The proposed requirements appear extremely burdensome and costly, to the extent that they might render the operation of a "non-profit NGO" extremely difficult and potentially lead to their liquidation (see Sub-Section III.9 below). This thus goes against the very essence of the right to freedom of association and is likely to have a chilling effect on the exercise of this right. This is notwithstanding the additional time and human/financial resources that would need to be allocated to the public bodies in charge of reviewing the said reports/documents. Therefore, **such new reporting and disclosure requirements should be repealed.**
66. In addition, all reporting should at the same time ensure respect for the rights of members, founders, donors, beneficiaries and staff, as well as the right of the association to protect legitimate business confidentiality.⁸¹ Obligations to report should be tempered by other obligations relating to the right to security of beneficiaries and to respect for their private lives and confidentiality; any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality.⁸² In certain circumstances, disclosing the names of certain employees of public associations⁸³ could potentially endanger their safety (for instance those who deal with certain issues such as anti-corruption, protection of victims of domestic violence or non-discrimination on the basis of gender, sexual orientation and gender identity) and could risk them being subjected to harassment.⁸⁴ In some circumstances, exposure of donors and contractors of associations could potentially affect donors' readiness to continue their support for and co-operation with these associations if they were publicly identified.

79 See ODIHR and Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 224.

80 See, ODIHR-Venice Commission, *Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, para. 69.

81 Recommendation, para. 64. See also, Joint Guidelines, paras. 228 and 231.

82 Explanatory Memorandum to the Recommendation, para. 116.

83 According to the draft laws, *inter alia* a list of 10 employees with the highest salaries would have to be made public.

84 See e.g., ODIHR-Venice Commission, *Ukraine - Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance"* (16 March 2018), para. 47.

67. Such far-reaching reporting and disclosure requirements interfere both with the right to privacy and with the right to freedom of association of the above persons and entities and cannot be justified as being “necessary in a democratic society”. To achieve certain legitimate aims such as protecting national security or preventing disorder or crime, much less intrusive disclosure rules could be designed, for example, requiring only the publication of anonymous data or total figures. In such cases, these disclosure requirements should be the same for all legal entities, including private businesses (any exceptions need to be clearly and objectively justified).

7. OVERSIGHT AND CONTROL

68. Article 35(1) and (2) of the Draft Law refers to several bodies to monitor “non-profit NGOs” and their activities and compliance with the laws of the Kyrgyz Republic. These include the Prosecutor General’s Office, Ministry of Justice, tax authorities and the prosecution authorities. Whereas the former oversees the implementation of “*laws and other regulatory legal acts*” by “non-profit NGOs”, the latter bodies monitor the “non-profit NGOs” activities’ compliance with their respective founding documents.
69. While commenting on the general supervisory functions of the prosecution service in the Kyrgyz Republic goes beyond the scope of this Urgent Interim Opinion, ODIHR thereby reiterates as done in the 2021 Joint Opinion on the Draft Constitution of the Kyrgyz Republic that such role should be limited to criminal investigation and prosecution.⁸⁵ Accordingly, it is questionable whether the Prosecutor General’s Office or prosecution authorities’ roles should be mentioned at all in the Draft Law. Indeed, their powers and functions are regulated by separate legislation of general application, especially in the field of criminal proceedings, and their specific mention in the Draft Law may create the impression of the existence of parallel procedures and rules when “non-profit NGOs” are involved. Also, where there are suspicions of possible violations of the criminal law by “non-profit NGOs”, the prosecution should act on the basis of the Criminal Procedure Code. Moreover, this mention of the prosecution service may have a chilling effect on those seeking to exercise their right to freedom of association. In any case, there should be no obligation on “non-profit NGOs” to report the prosecution service and in case there are suspicions of commission of criminal offence, the prosecution service should act on the basis of criminal procedural legislation.
70. Similarly, it is unclear why tax authorities should be mentioned at all given that allegedly, “non-profit NGOs” should be subject to tax legislation of general application and report to the tax authorities in accordance with such legislation, as private businesses would do. While tax authorities may in certain circumstances request information, this should not exceed the purpose of ensuring compliance with the applicable tax law and the said powers should be the same as those applicable to private entities. Any additional reporting obligation to tax authorities for “Non-profit NGOs” would appear unjustified and could hardly be considered necessary and proportionate. **It is recommended to remove the reference to these bodies from the Draft Law.**
71. As regards the Ministry of Justice, it should be emphasized that, as recommended in the Joint Guidelines, “*Consideration may be given to ensuring that the government body in charge of granting the status of legal entity to an association is separate from the*

85 ODIHR and Venice Commission, [Joint Opinion on the Draft Constitution of the Kyrgyz Republic](#) (2021), para. 105.

government body or bodies in charge of their oversight and supervision”.⁸⁶ **The Draft Law should be amended in this respect.**

72. For the purpose of monitoring, according to Article 35(2) of the Draft Law, these bodies are entitled to:

“2...

1) request administrative and financial documents from the management bodies of non-governmental organizations;

2) request and receive information about financial and economic activities of non-commercial organizations from state statistical authorities, tax authorities and other public oversight and monitoring authorities, as well as from banking institutions and other financial organizations;

3) send representatives to participate in events/activities held by non-governmental organizations;

4) check the compliance of non-governmental organization's activities, including expenditure of funds and use of other property, with the objectives set out in its founding documents and charter (no more often than once a year);

5) issue a written warning to a non-governmental organization, violating the legislation of the Kyrgyz Republic or committing actions contrary to the objectives set out in its constituent documents and charter, indicating the violation and the deadline for its elimination, which shall not be less than one month. The warning issued to the non-governmental organization may be appealed to a higher authority or court...”

73. Similarly, the Draft Amendments vest the State authorities with extensive control and oversight powers over activities of foreign non-governmental organizations. According to the new Article 17 proposed by the Draft Amendments, the authorities may, *inter alia*, request documents relating to the operation of such organizations and review the compliance of their activities with their own statutes, including with respect to the use of funds.
74. These provisions provide broad powers to public authorities, including the Ministry of Justice, Prosecutor’s Office and tax authorities in the case of the Draft Law, to supervise the activities of “non-profit NGOs”/NPOs. The Joint Guidelines emphasize that, in general, regulations and practices on oversight and supervision of associations should take as a starting point the principle of minimum state interference in the operations of an association.⁸⁷
75. Article 35 of the Draft Law provides the Ministry of Justice, Prosecutor’s Office and tax authorities the power to request and receive information about financial and economic activities of “non-profit NGOs” from state statistical authorities, tax authorities and other public oversight and monitoring authorities, as well as from banking institutions and other financial organizations. It is noted that the right to privacy applies to an association and its members and therefore oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue.⁸⁸ Oversight and supervision practices should not be invasive, nor should they be more stringent than those applicable to private businesses. Such oversight should always be carried out based on the presumption of

86 See ODIHR and Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 229.

87 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 228.

88 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 228.

lawfulness of the association and of its activities. Moreover, such oversight should not interfere with the internal management of associations, and should not compel associations to co-ordinate their objective and activities with government policies and administration.⁸⁹ As noted in the Joint Guidelines, “*Cases of external intervention in the activities of associations should only be undertaken in extremely exceptional circumstances*” and should only be permissible in order to “*bring an end to a serious breach of legal requirements, such as in cases where either the association concerned has failed to address this breach, or where there is a need to prevent an imminent breach of said requirements because of the serious consequences that would otherwise follow*”.⁹⁰ **The Draft Law fails to reflect the above-mentioned safeguards and should be supplemented in this respect.**

76. The excessive nature of the oversight mechanisms that the Draft Law provides is further exemplified in Article 35(2)(3) on the basis of which representatives of the authorized bodies can take part in event/activities of “non-profit NGOs” without clarifying the purpose and the grounds for attendance (see para. 77 below regarding the grounds for carrying out inspections). As underlined in the Joint Guidelines, “[u]nder no circumstances should legislation mandate or permit the attendance of state agents at non-public meetings of associations, unless they are invited by the association itself”.⁹¹ **It is recommended to remove such a power provided under Article 35(2)(3).**
77. Keeping in mind the above-mentioned recommendations regarding the bodies in charge of oversight (paras. 69-71), in any case, state oversight or controls should be limited to cases where there are sufficient grounds to believe there is a serious violation of the legislation, and should only serve the purpose of confirming or discarding the suspicion. However, the regulations on inspection must be clear, should not be excessive, vaguely defined or provide public authorities with too much discretion and be subject to effective judicial control. This could lead to abuse and a selective approach being taken, as well as to the misuse of the regulations, potentially leading to harassment. Also, legislation should contain safeguards to ensure the respect of the right to privacy of clients, members and founders of associations, as well as provide redress for any violation in this respect.⁹² In the current situation, it appears that the legal drafters have not taken such a cautious approach and have introduced unchecked power to certain state bodies in their application of oversight over “non-profit NGOs”. In any case, no supervisory bodies should have the authority to check whether the objectives of the founding documents are implemented, which should fall under the sole purview of the NGOs and their members (see para. 84 below). Finally, due to the lack of clarity regarding the scope of the Draft Law, it also appears that these oversight mechanisms may potentially apply to all types of NGOs, including political parties and religious organizations (see above Sub-Section III.3).
78. In view of the above, **the oversight and control powers foreseen by the Draft Law conflict with the freedom of association, the prohibition of discrimination and the right to respect for one’s private life. Since no legitimate aim or concrete need for those amendments have been substantiated, and given the requirements set out by the international instruments quoted above, it is more specifically recommended to remove from the prosecution service and the office of the Prosecutor-General the powers to supervise “non-profit” NGOs, to remove the powers of the authorized state bodies to check the compliance of the activities that “non-profit NGOs”**

89 ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2014), para. 228. See also ODIHR and the Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013, para. 228.

90 ODIHR and the Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 177.

91 ODIHR and the Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 176.

92 *Ibid.* *Joint Guidelines on Freedom of Association* (2014), paras. 230-231.

implement with their respective founding documents and to more clearly circumscribed any supervisory powers.

79. Article 24 of the Draft Law provides that NGOs may carry out one or several types of activities not prohibited by the legislation and corresponding to objectives of the non-governmental organization set out in its founding documents and charter (para. 1) and that legislation of the Kyrgyz Republic may establish restrictions on types of activities in which non-governmental organizations of certain types are entitled to engage (para. 2).
80. In this regard, it is observed that the restrictions on certain types of activities provided in Article 24(2) of the Draft Law is open-ended as the Draft Law does not clarify the procedure through and circumstances under which such restrictions shall be applied. This provision leads to legal uncertainty and provides leeway for broad interpretation, including for the registration process for which extensive documentation is required, and could be rejected where the information provided is found to be insufficient. Similar observations are made in respect of Article 24(3) of the Draft Law.
81. Article 25(3) of the Draft Law provides that the establishment and operation of NGOs “*that infringe on the health and morals of the population, rights and legally protected interests of citizens shall be prosecuted in accordance with the law.*”
82. As already observed in the 2013 ODIHR and Venice Commission Joint Opinion: “*Overall, the State has the duty not to interfere with the crucial activities of any established association. Once the association is set up, the essential relationships are between this body and its members and between this body and non-members. State supervision and intervention should only be limited to cases in which this is necessary to protect the members, the public, or the rights of others. Non-commercial organizations should, therefore, not be subject to direction by public authorities. The corollary to the principle of the independence of associations from the government is that they should be entitled to decide their own internal structure, to choose and manage their own staff and to have their own assets. The State may not issue instructions on the management and activities of the associations. State supervision should be limited to cases where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. In the absence of evidence to the contrary, the activities of associations should be presumed to be lawful.*”⁹³
83. Although states have a right to satisfy themselves that an association’s aim and activities are in conformity with their legislation – providing that such legislation are compliant with international human rights standards, they must do so in a manner compatible with their obligations under the international legal instruments. In particular, these legitimate aims should not be used as a pretext to control associations or to restrict their ability to accomplish their legitimate work, and should not result in seeking to stigmatize and ostracize some of the civil society organizations solely on the basis of foreign funding.⁹⁴ **It is recommended to review these provisions and remove those that constitute undue and excessive interference by state bodies in the activities and internal matters of “non-profit NGOs”.**
84. Further, the Draft Law allows the Ministry of Justice and other state bodies to check the compliance of “non-profit NGOs” activities, including expenditure of funds and use of other property, with the objectives set out in its founding documents and charter (Article 34(2)(4) of the Draft Law). Such wide oversight powers in this and other provisions are

93 ODIHR and the Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013, para. 76.

94 See e.g., Venice Commission, *Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad of Hungary*, CDL-AD(2017)015, para. 41.

of particular concern, given that securing compliance with an organization’s goals and objectives should be a matter for its founders, members and participants and not for public bodies. As stated in the Joint Guidelines, “*Inspections conducted with the primary purpose of verifying compliance with internal procedures of an association should not be permissible [...] Moreover, under no circumstances should associations suffer sanctions on the sole ground that their activities breach their own internal regulations and procedures, so long as these activities are not otherwise unlawful.*”⁹⁵ Such an approach is guided by the general principles of self-governance and independence of associations.⁹⁶ Moreover, in the absence of evidence to the contrary, the activities of associations should be presumed to be lawful.⁹⁷ **This and other provisions of the Draft Law that provide public authorities control and may impose sanctions in case of non-compliance with the constitutive documents of a “non-profit NGO” should not be permissible and should be removed entirely**, all the more since this ground may potentially lead to the liquidation of an NGO (see Sub-Section III.9 below).

85. Article 35(5) of the Draft Law provides that the Prosecutor General’s Office or the Ministry of Justice shall be entitled to send to a subdivision of a FNGO a reasoned decision in writing to prohibit implementation of a program or part thereof declared for implementation on the territory of the Kyrgyz Republic. Upon the receipt of such a decision, the subdivision of the FNGO shall cease activities related to implementation of this program in the part specified in the recommendation. It is not clear on which grounds such a prohibition could be pronounced. As stated in the Joint Guidelines, “*[c]ases of external intervention in the running or management of associations should only be undertaken in extremely exceptional circumstances*” and “*[i]ntervention should only be permissible in order to bring an end to a serious breach of legal requirements*”.⁹⁸ These could include cases where an association’s objectives and activities promote propaganda for war, the incitement of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, defined in accordance with international human rights standards as well as the achievement of goals that are inconsistent with democracy or that are prohibited by laws that are not themselves contrary to those standards.⁹⁹ Moreover, sanctions amounting to the effective suspension of activities, “*should only be applied in cases where the breach gives rise to a serious threat to the security of the state or of certain groups, or to fundamental democratic principles*” and “*should ultimately be imposed or reviewed by a judicial authority*”.¹⁰⁰ Hence, **the ability to prohibit the implementation of a programme by a branch or subdivision of a FNGO should be restricted to very limited and exceptional circumstances mentioned above, provided for in law, and imposed or reviewed by a judicial authority.**
86. Finally, Article 32 of the Draft Law introduces restrictions on participation of persons holding government or municipal offices in management bodies, boards of trustees or supervisory boards, other bodies of FNGOs. These persons may not engage in paid activities financed by foreign states, international and foreign organizations, foreign citizens and stateless persons, unless otherwise provided by the legislation of the Kyrgyz Republic.

95 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 178. See also e.g., Venice Commission, *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, CDL-AD(2014)04, para. 77.

96 ODIHR and the Venice Commission, *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013, para. 73.

97 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), Principle 1.

98 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 177.

99 ODIHR and the Venice Commission, *Joint Guidelines on Freedom of Association*, (2014), para. 179.

100 ODIHR and Venice Commission, [Guidelines on Freedom of Association](#) (2014), para. 239.

87. The ICCPR (and the ECHR) expressly recognize the possibility of imposing certain restrictions on the exercise of the right to freedom of association by some public officials. Such restrictions may be justified in cases where forming or joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned. Moreover, every restriction must still respect the principle of proportionality. The complete ban on engagement by persons holding government or municipal offices in management bodies, boards of trustees or supervisory boards, *and* other bodies of FNGOs appears to be disproportionate. Of note, according to the ECtHR, the category of persons liable to be subjected to these restrictions must be limited, and public employment or public funding for a position are unlikely to be sufficient bases for such restrictions. **It is recommended to ensure that any restrictions that are introduced to civil servants or holders of public officers in this regard are necessary and proportionate.**

8. FUNDING

88. Article 27(2) of the Draft Law provides that restrictions on the sources of income of certain types of NGOs may be established by law. As underlined in Principle 7 of the Joint Guidelines, associations must have the means to pursue their objectives, meaning that they should have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international.¹⁰¹ Undue restrictions on funding sources may impair the implementation of activities by NGOs and risks their very existence. As noted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, “*associations – registered and unregistered – can seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments, including from individuals; associations, foundations or other civil society organizations; foreign Governments and aid agencies; the private sector; the United Nations and other entities.*”¹⁰² Any restrictions regarding access to resources, including from abroad, must not only be prescribed by law, but also pursue a legitimate aim and be necessary and proportionate to the objectives pursued. Currently, the restriction is drafted in a broad manner and **it is recommended to introduce clear language in the provision where certain restrictions may be applied in the receipt of certain types of resources, providing that they comply with the strict requirements of international human rights standards and are also applicable in the same manner to other legal entities, such as private businesses.**
89. Article 34(6) of the Draft Law states that a subdivision of a FNGO shall inform the state statistics and tax authorities and the Ministry of Justice “*of the amount of funds and other property received by it, on intended allocation, purposes of expenditure or use and actual expenditure or use of these funds and property, on programs intended for implementation in the Kyrgyz Republic, on expenditure of these funds provided to individuals and legal entities and on the use of other property provided to them in the form and within the time limits established by the Cabinet of Ministers.*” Article 35(6) of the Draft Law provides that for the purpose of protecting the foundations of the constitutional system, morality, health, rights and legitimate interests of citizens, national defence and state security, the Prosecutor General’s Office or the Ministry of Justice may issue in writing a reasoned

¹⁰¹ *Joint Guidelines on Freedom of Association* (2014), para. 102.

¹⁰² UN HRC, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, A/HRC/23/39, 24 April 2013, para. 81 (d).

- decision to prohibit a subdivision of a FNGO from sending funds and other property to certain recipients of these funds and other property.
90. These provisions provide far-reaching interference powers to the Prosecutor General’s Office and the Ministry of Justice in the internal affairs of a FNGO without indicating any justification nor limitations thereto. As mentioned above, State supervision should be limited to cases where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. Moreover, the modalities of such control should not be unreasonable, overly intrusive or disruptive of lawful activities.
 91. Furthermore, associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources. This freedom shall be subject only to the requirements in laws that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards.¹⁰³
 92. In certain circumstances, the requirement of the provision of information may be legitimate such as for associations that receive public funding for their activities to ensure that taxpayers have access to information regarding the statutes, programmes and financial reports of associations. However, any such reporting requirements should not create an undue and costly burden on associations and should be proportional to the amount of funding received. The Draft Law does not appear to make any such differentiation.
 93. **It is recommended to reconsider the obligation for branches and subdivisions of FNGOs to report on their funding allocation, the use and actual expenditures of these funds, programs intended for implementation and funds provided to individuals and legal entities to ensure that they are not overly burdensome and that they are not more exacting than those applicable to other entities such as private businesses. Specifically, reporting to tax authorities may be acceptable providing that comparable obligations do apply to foreign branches of private businesses. The powers accorded to the Prosecutor General’s Office and the Ministry of Justice to issue a decision prohibiting the implementation of (parts of) the FNGOs activities and from sending funds and other property to certain recipients on the grounds of the constitutional system, morality, health, rights and legitimate interests of citizens should be removed.**

9. SANCTIONS AND LIQUIDATION

94. Article 20 of the Draft Law provides the grounds based on which a “non-profit NGO” may be liquidated. These include cases where a “non-profit NGO” lacks resources necessary to achieve its goals and is unlikely to obtain them; if it cannot achieve its goals or make the necessary adjustments to them; if its activities deviate from the goals stipulated in its charter; and in other cases provided for by law. Article 21 provides the procedure for liquidation. Article 35(4) of the Draft Law provides additional grounds to file an application to the courts to seek liquidation of a “non-profit NGO” by providing that “*Violations of the Constitution and laws of the Kyrgyz Republic, systematic*

103 ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 192.

implementation of activities contrary to the charter of a non-governmental organization, systematic failure of the non-governmental organization to provide information stipulated by this Law within the prescribed deadline shall constitute grounds for the Prosecutor’s Office of the Kyrgyz Republic, the Ministry of Justice of the Kyrgyz Republic or its territorial body to apply to court for liquidation of this non-governmental organization.”

95. The list of grounds for liquidation provided in the Draft Law are broad, vague and leave room for arbitrary interpretation. As mentioned above, control over the “non-profit NGO”’s compliance with its goals and objectives as stated in its founding documents is problematic. Further, the provisions on liquidation leave the authorized bodies with excessive discretionary powers to make assessments of the activities carried out by the NGOs. Thus, grounds to file an application with a court for liquidation of a “non-profit NGO” are of a disproportionate nature. Whilst the reference to “*systemic*” implies that there has been a recurring issue with compliance by the “non-profit NGOs” with implementation of activities contrary to the charter of the NGO and to provide information stipulated by this Draft Law within the prescribed deadline, it is noted that these requirements as such are problematic as “non-profit NGOs” should in principle be able to carry out any activity unhindered, provided that their activities are in compliance with applicable legislation. This is further compounded by the burdensome nature of the reporting obligations, including to bodies for which no such justification exists (such as the Prosecutor General, Ministry of Justice and prosecution service) on the one hand and on the other hand the far-reaching powers of the state bodies to monitor the internal affairs of the NGO. This is further complicated by the lack of a system by which gradual penalties can be applied for situations in which the NGO may be found to violate the law.
96. In general, any penalty or sanction amounting to the effective dissolution or prohibition of an association must be proportionate to the misconduct of the association and may never be used as a tool to reproach or stifle its establishment and operations.¹⁰⁴ Associations should not be prohibited or dissolved owing to minor infringements, or of other infringements that may be easily rectified. In addition, associations should be provided with adequate warning about the alleged violation and be given ample opportunity to correct infringements and minor infractions, particularly if they are of an administrative nature. Under no circumstances should associations be sanctioned solely on the grounds that their activities are in violation of their own internal rules and procedures (provided that these activities are not prohibited by laws that are themselves consistent with international human rights standards).¹⁰⁵
97. It is recommended **to remove the grounds for the liquidation of “non-profit NGOs” currently mentioned in the Draft Law and provide instead that such a sanction be only applied as a measure of last resort and only where activities carried out by the “non-profit NGO” are prohibited by laws that are themselves consistent with international human rights standards. Consideration should be given to providing a range of sanctions of varying severity depending on the seriousness of the non-compliance with legal prescriptions (such as official warnings, fines, temporary suspension) that would enable organizations to take corrective action (or pursue appropriate appeals), before taking the harsh step of liquidating the “non-profit NGO”, which should be a measure of last resort.**

104 ODIHR and Venice Commission, *Joint Guidelines on Freedom of Association*, para. 252.

105 *Ibid.* *Joint Guidelines on Freedom of Association*, para. 178.

98. Also, the Draft Law and the Draft Amendments fail to indicate explicitly that **sanctions must be applied with due respect for the principle of proportionality. This principle should be clearly stated in applicable legislation.**
99. The non-compliance with Article 35(5) and (6) of the Draft Law can lead to the liquidation of the branch or subdivision of a FNGO. Article 35(4) provides that where a FNGO violates the law or commits acts contrary to its stated goals and objectives, the prosecution authorities and the Ministry of Justice of the Kyrgyz Republic may issue a written warning to the head of the corresponding subdivision of the FNGO, indicating the violation and the deadline for its elimination, which should be within one month. Article 20(4) of the Draft Law provides that a FNGO may also be liquidated “...1) *in case of liquidation of the foreign non-governmental organization, 2) systematic failure to provide information stipulated by this Law on the amount of funds and other property received by this subdivision, on intended allocation, purposes of expenditure or use and actual expenditure or use of these funds and property, on programs intended for implementation in the Kyrgyz Republic, on expenditure of these funds provided to individuals and legal entities and on the use of other property provided to them in the form and within the timeframe established by the Cabinet of Ministers of the Kyrgyz Republic and 3) in case its activities do not correspond to the purposes stipulated in the founding documents...*”.
100. As noted above any penalty or sanction amounting to the effective dissolution or prohibition of an association must be proportionate to the misconduct of the association and may never be used as a tool to reproach or stifle its establishment and operations.¹⁰⁶ The grounds for liquidation of a branch or subdivision of a FNGO are overbroad and leave way for arbitrary interpretation. The reasoning noted above (see paragraphs 95-97 above) similarly apply here.
101. **It is recommended that the legal drafters limit the grounds for the possible termination of a branch or subdivision of a FNGO to where its activities are prohibited by laws that are themselves consistent with international human rights standards.**
102. Article 17 of the Draft Amendments also provides sanctions for situations in which the FNGOs have not provided the requested information, in the event of a violation of the legislation of the Kyrgyz Republic or if its structural subdivision committed actions that contradict the goals provided for by its constituent documents. The same concerns as the ones raised in relation to the Draft Law apply. Especially, undertaking actions which are perfectly lawful but go beyond the charter of an organization, for example, should in no way be a basis for the de-registration and suspension of the activities of the organisation, or part of an organization.

10. TRANSITORY PROVISIONS AND OBLIGATION TO RE-REGISTER

103. Article 37(3) of the Draft Law provides that existing organizations shall be re-registered by 31 December 2023 in accordance with requirements of the Draft Law and that those that fail to re-register in accordance with the new requirements shall be considered liquidated from 1 January 2024 (paragraph 4). FNGOs shall be undergo state registration by 31 December 2023 and in the failure thereof will be liquidated as of 1 January 2024.
104. As emphasized in the Joint Guidelines, re-registration should not automatically be required following changes to legislation on associations and renewals of registration

¹⁰⁶ ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 192 and para. 252.

may be required only in exceptional cases where significant and fundamental changes are to take effect.¹⁰⁷ In such cases, the competent authorities should first notify the respective association of the need to re-register, and should provide them with a sufficient transitional period to enable the associations to comply with the new requirements.¹⁰⁸ As the UN Special Rapporteur noted “*newly adopted laws should not request all previously registered associations to re-register so that existing associations are protected against arbitrary rejection or time gaps in the conduct of their activities*” and that registration should more be a matter of notification rather than a procedure through which permission is obtained.¹⁰⁹ In any case, even if they do not re-register, the associations should be able to continue to operate without being considered unlawful. The proposed changes do not appear to justify re-registration or liquidation for failure to do so, including for those existing associations that do not meet the new registration requirements such as the minimum number of members. **It is therefore recommended to remove the provision requiring re-registration of all NGOs and FNGOs.**

11. CONCLUSION

105. In light of the foregoing, **the Urgent Interim Opinion concludes that the Draft Law and Draft Amendments on Foreign Representatives suffer from serious deficiencies and are incompatible with international human rights standards and OSCE human dimension commitments. Given the inherent serious deficiencies of the two sets of amendments, they require very comprehensive, substantial and fundamental changes amounting to a complete re-drafting to seek to make them human-rights compliant. ODIHR therefore calls upon the initiators of the proposed amendments to abandon them entirely and not to pursue their adoption.**

IV. “FOREIGN REPRESENTATIVES”

106. At the outset, ODIHR notes that the second set of amendments, related to so-called “Foreign Representatives”, are similar if not almost identical to the draft amendments related to “foreign agents” that ODIHR reviewed with the Venice Commission in 2013, except for the replacement of the term “foreign agent” with “foreign representative” and the removal of the obligation for the “foreign representatives”/“foreign agents” to have their communications/publications labelled as emanating from such entities. The concerns raised in that Joint opinion therefore are reiterated herein without reservation. Consequently, **the relevant stakeholders in the Kyrgyz Republic should reconsider the Draft Amendments in their entirety and not pursue their adoption by the Jogorku Kenesh.**
107. Indeed, as emphasized in the 2013 Joint Opinion, the proposed Draft Amendments raise the following key concerns:
- non-compliance with the principle of legal certainty and foreseeability of the definition of “foreign representatives”, especially of the meaning of carrying out “political activities”, which renders the scope of the notion and related obligations

¹⁰⁷ *Ibid.* Joint Guidelines on Freedom of Association, para. 165.

¹⁰⁸ *Ibid.* Joint Guidelines on Freedom of Association, para. 165.

¹⁰⁹ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2012 Report to the UN Human Rights Council, UN Doc. [A/HRC/20/27](#), 21 May 2012, para. 62.

- uncertain and thereby would allow unfettered discretion on the part of the implementing authorities (see section 3 of the 2013 Joint Opinion);
- the risk of stigmatizing certain organizations carrying out legitimate work, including advocacy and participation in public affairs/debate, and potentially of triggering mistrust, fear and hostility against such organizations, including from the public and public institutions/bodies, thereby rendering their operation/activities overly difficult (see section 3 of the 2013 Joint Opinion);
 - the lack of justification for introducing the new restrictions; ODIHR wishes to reiterate that the legitimacy of the aim to ensure “transparency” of the funding of associations is not *per se* a legitimate aim under international human rights instruments (see para. 60 above);
 - the non-respect of the principle of non-discrimination, enshrined in Article 26 of the ICCPR, as such obligations are applicable on the basis of the foreign origin of the funding of such organizations (see section 3 of the 2013 Joint Opinion);¹¹⁰
 - the disproportionate obligations imposed on so-called “foreign representatives”, including overly burdensome and costly reporting requirements, given in particular that these obligations apply to all such organizations, irrespective of their size and scope of operations, and that they combine quarterly, semi-annual and annual reporting, as well as auditing requirements, thereby rendering the compliance with such rules extremely difficult and costly, without clear justification prompting the imposition of additional obligations specifically on such organizations (see section 4 of the 2013 Joint Opinion);
 - the fact that the means of control, including the possibility of unscheduled inspections, are not based on clear legal grounds and not authorized by court order, which may have a chilling effect and could also constitute a tool of potential intimidation and harassment in the hands of authorities, which could be used against organizations which voice criticism or dissent (see section 5 of the 2013 Joint Opinion);
 - the amendments to the Criminal Code providing for fines and imprisonment for certain activities do not meet the standards of legal certainty, foreseeability and specificity of criminal law, which requires that criminal offences and related penalties be defined clearly and precisely, so that an individual knows from the wording of the relevant criminal provision which acts will make him/her criminally liable (see section 7 of the 2013 Joint Opinion).
108. Of note, ODIHR thereby also wishes to refer to the recent case-law of the European Court of Human Rights on “foreign agent” legislation, which concludes that it is not compliant with the right to freedom of association for not being “prescribed by law” nor “necessary in a democratic society”.¹¹¹

110 In this respect, as the Joint Guidelines note, “while the foreign funding of non-governmental organizations may give rise to some legitimate concerns, regulations should seek to address these concerns through means other than a blanket ban or other overly restrictive measures”; see *Joint Guidelines on Freedom of Association* (2014), para. 219.

111 See ECtHR, *Ecodefence and Others v. Russia* (Application nos. 9988/13 and 60 others), judgment of 14 June 2022, finding that such legislation was neither prescribed by law nor necessary in a democratic society, noting in particular that the concepts of “political activity” and “foreign funding” was insufficiently foreseeable and lacking sufficient safeguards against abuse, that there was no relevant and sufficient reasons for introducing such new status and for imposing additional requirements or restrictions on organisations registered, with sanctions for breaches being unforeseeable and disproportionate manner, noting also the significant chilling effect on choice to seek or accept any amount of foreign funding.

V. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING THE DRAFT LAW

109. OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8). Moreover, key commitments specify, “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, para. 18.1). As emphasized in the Joint Guidelines on Freedom of association:
- “Associations and their members should be consulted in the process of introducing and implementing any regulations or practices that concern their operations. They should have access to information and should receive adequate and timely notice about consultation processes. Furthermore, such consultations should be meaningful and inclusive, and should involve stakeholders representing a variety of different and opposing views, including those that are critical of the proposals made. The authorities responsible for organizing consultations should also be required to respond to proposals made by stakeholders, in particular where the views of the latter are rejected.”¹¹²*
110. For consultations on draft legislation to be effective, they need to be inclusive and involve consultations and comments by the public, including civil society organizations. They should also provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals. To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process, meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings).
111. On 2 November 2022, the Draft Law was published on the governmental web site by the Department of Legal Support of the President and the Cabinet of Ministers with indication of email for submitting proposals. At the same time, no deadline was indicated for sending proposals on the draft by the public/civil society organizations, nor were other details relating to the modalities of public consultations set out in relevant public documents. Consequently, the public was not properly informed about the time available to provide input, thereby putting into question the openness, transparency and genuineness of the public consultation, which may ultimately undermine trust in the process.
112. There is also no information about the body in charge of reviewing the proposals, timeframe and modalities of its work, the respective steps of the process and whether the public will have an opportunity to provide more feedback at a later stage of the legislative process. At the same time, in the Explanatory Statement to the Draft Law, it is mentioned that it was posted on the official website of the Cabinet of Ministers of the Kyrgyz Republic for general discussion and the proposals received “*were taken into account when finalizing the Draft Law*”. If this means that the public consultations are over, it is

¹¹² Joint Guidelines on Freedom of Association (2014), para. 106.

not clear whether the process of discussion of the Draft Law so far led to any serious changes in the draft submitted for discussion and whether any of the proposals were taken into account (and if not, the *rationale* for not doing so). While the willingness to organize some forms of public consultations during the law-making process is welcome, the modalities of such public consultations and the lack of adequate and timely feedback mechanism may raise doubt as to whether the public consultations were or will be effective and inclusive as mentioned above. This may also indicate that the authorities viewed the process as a pure formality.

113. The legal drafters have prepared an Explanatory Statement to the Draft Law, which lists a number of reasons justifying the contemplated reform. However, it does not mention the research and impact assessment on which these findings are based. The Explanatory Statement contains a conclusion that the Draft Law’s adoption will not entail social, economic, gender, environmental, corruption consequences. It also states that allocation of funding sources from the state budget for the implementation of the provisions of the Law is not required. It further states that “*this draft law does not address business issues, and no regulatory impact analysis is required*”.
114. At the same time, there is no information provided on when and how the regulatory impact assessment, also assessing the gender, diversity and human rights impact of the proposed legislative initiatives has been conducted, including the relevant data collection to allow for a sufficient analysis. The Draft Law creates a considerably more restrictive environment compared to the current legislative framework for associations. The new burdensome reporting requirements and increased state oversight powers will also have negative impact on the functioning of remaining associations – with the same disproportionate negative effect on under-resourced smaller organisations working for underserved communities. These considerations should be at the heart of the impact assessment, and any potential benefits of the law should be carefully weighed against the law’s negative impact on the exercise of the right to freedom of association.
115. Impact of the Draft Law needs to be considered also from a gender, diversity and intersectionality perspective to ensure that all persons and groups, including men, women and non-binary people, persons with disabilities, the youth and elderly persons, ethnic, national or religious communities are not adversely affected by the proposed legislation. The consequences of adoption of the said Draft Law, especially taking into consideration already raised concerns regarding its substance, could be significant for women’s and youth organizations, LGBT and minority communities and groups.
116. In addition, it seems that the monitoring of implementation of the existing legislation governing NPOs, including of its latest amendments of June 2021, has never been conducted to ensure evidence-based policy- and law-making by compiling evidence on what has worked well in the past, measuring the impact and thus effectiveness of existing government policies and adopted laws and taking an informed decision.
117. As noted, on 21 November 2022 the Draft Amendments on Foreign Representatives, were published on 21 November 2022 for public discussion on the official website of the Jogorku Kenesh.¹¹³ Similarly to the Explanatory Note to the Draft Law, the Draft Amendments’ Explanatory Note foresees no social, economic, gender, environmental, corruption consequences. It also states that allocation of funding sources from the state budget for the implementation of the provisions of the Law is not required. It further

113 Available at <<http://www.kenesh.kg/ru/article/show/9730/na-obshtestvennoe-obsuzhdenie-s-21-noyabrya-2022-goda-vinositsya-proekt-zakona-o-vnesenii-izmeneniy-v-nekotorie-zakonodatelnyie-akti-kirgizskoy-respubliki-zakon-kirgizskoy-respubliki-okenommercheskih-organizatsiyah-zakon-kirgizskoy-respubliki-ogosudarstvennoy-registratsii-yuridicheskikh-lits-filialov-predstavitelstv-ugolovnyy-kodeks-kirgizskoy-respubliki>>.

states that *"this draft law does not address business issues, and no regulatory impact analysis is required"*. Therefore similar observations apply as made above with respect to the process of preparing the Draft Law.

118. It is further underlined that sufficient time should be allocated for discussions and that meaningful debates should be held in the Jogorku Kenesh for both legislative initiatives, taking into account their far-reaching consequences for a fundamental human rights.
119. In light of the above, **the public authorities are encouraged to ensure that the Draft Law and the Draft Amendments are subjected to inclusive, extensive and effective consultations, including with civil society and representatives of various communities, offering equal opportunities for women and men to participate and that sufficient time is provided for a meaningful parliamentary debate. According to the principles stated above, consultations should take place in a timely manner, allowing for enough time for the public to provide input, at all stages of the law-making process, including before Parliament. A proper feedback mechanism should be in place. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the said amendments and their impact should also be put in place that would efficiently evaluate the operation and effectiveness of the Draft Law/Draft Amendments, if adopted.**¹¹⁴

[END OF TEXT]

¹¹⁴ See e.g., OECD, *International Practices on Ex Post Evaluation* (2010).